

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 16, 2002 Session

ROBERT EMMETT VAN HORN v. LINDA GAIL VAN HORN

**Appeal from the Circuit Court for Hamilton County
Nos. 91DR1738 & 96DR0524 L. Marie Williams, Judge**

FILED JULY 24, 2002

No. E2001-00519-COA-R3-CV

This is a divorce case. In 1992, the trial court granted Linda Gail Van Horn (“Wife”) a bed and board divorce from her husband, Robert Emmett Van Horn (“Husband”). In 1993, Husband filed a complaint seeking an absolute divorce. Six years later, following the filings of various pleadings by each of the parties and the filing of a new divorce complaint by Husband under a new docket number, the trial court consolidated the two proceedings, held a hearing, and declared the parties divorced pursuant to T.C.A. § 36-4-129 (2001).¹ Wife appeals, arguing that the trial court erred in granting an absolute divorce; that the trial court’s division of marital property is not equitable; that the trial court erred in failing to require Husband to carry insurance on his life for the benefit of Wife; that the trial court erred in requiring Husband to pay only one-third of Wife’s uncovered medical expenses; and that the trial court erred in failing to require Husband to pay the taxes and insurance on the former marital residence. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and D. MICHAEL SWINEY, JJ., joined.

Leroy Phillips, Jr., Chattanooga, Tennessee, for the appellant, Linda Gail Van Horn.

Phillip C. Lawrence, Chattanooga, Tennessee, for the appellee, Robert Emmett Van Horn.

OPINION

¹T.C.A. § 36-4-129 provides, in pertinent part, as follows:

(b) The court may, upon stipulation to or proof of any ground for divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce, declare the parties to be divorced, rather than awarding a divorce to either party alone.

I. Background

Husband and Wife were married in 1979. There were no children born to their union. At the time of the marriage, Husband was employed by the Fire Department of the City of Chattanooga and Wife worked as a licensed dental assistant.

The testimony in the record reveals that Husband began having extramarital affairs shortly after the parties were married and that these affairs continued for several years, apparently with Wife's acquiescence. In 1985, Wife was diagnosed with Crohn's disease, a debilitating disease of the colon. As a result of her condition, Wife was declared disabled by the Social Security Administration and was no longer able to maintain gainful employment. Around this same time, Wife began objecting to Husband's affairs. In 1991, Husband began an affair, which was the impetus for the parties' separation. One week after their separation, Husband filed for an absolute divorce, alleging irreconcilable differences. Wife answered, denying that irreconcilable differences existed. She coupled her answer with a counterclaim, seeking, ultimately, only a divorce from bed and board, premised upon the grounds of cruel and inhuman treatment and adultery.

The original pleadings were heard on November 25, 1991. A final judgment was entered January 31, 1992, dismissing Husband's complaint and granting Wife a divorce from bed and board. This bed and board divorce – as the trial court then pointed out in its post-trial comments – would allow Wife to remain on Husband's health insurance policy. The trial court awarded each of the parties "possession"² of various items of real and personal property. It ordered Husband to pay the parties' mortgage and various household expenses. Finally, it directed that Husband would pay Wife \$50 per week as alimony *in futuro*. Neither party appealed from this judgment.

On April 13, 1993, Husband filed a complaint in the original proceeding, again seeking an absolute divorce. A subsequent order of the trial court recites that Husband, by this pleading, was purposely "seeking an absolute divorce before the expiration of two years from the entry of the bed and board divorce decree based on allegations of inappropriate marital conduct." Wife responded to the complaint by asserting that an absolute divorce could not be awarded to the party against whom the bed and board divorce had been awarded. Husband voluntarily non-suited his 1993 complaint on March 1, 1996.

On the day Husband non-suited his 1993 complaint, he filed a new complaint for absolute divorce pursuant to T.C.A. § 36-4-101(15) and T.C.A. § 36-4-102(b) under a new docket number

²The trial court was careful not to award either of the parties title to any of their assets. It specifically stated that its award of possession

does not entitle the parties to sell, transfer or encumber said property. They are simply to possess said property until further orders of the court.

in circuit court. The trial court³ consolidated the two proceedings for trial. Following a bench trial, the court entered an order on October 7, 1999, in which the court declared the parties divorced pursuant to T.C.A. § 36-4-129(b). As the court did not have before it an updated statement of the parties' assets and liabilities, it deferred a decision on property division and alimony. A hearing on these reserved issues was held in August, 2000. By order entered October 24, 2000, the court divided the parties' marital property as follows:

<u>Assets/Debts</u>	<u>Value</u>	<u>Wife</u>	<u>Husband</u>
Marital Residence	\$ 77,000	\$ 77,000	
– G.E. Capital Mortgage	<33,000>		<\$33,000>
Household Furnishings	2,500	2,500	
1984 Oldsmobile Automobile	3,000	3,000	
1989 Suzuki Automobile	750	750	
1997 Ford Truck	15,000		15,000
1991 Toyota Truck	6,000 ⁴		6,000
Lawn/Garden Equipment	500		500
Office Equipment	2,000		2,000
John Deere Trailer	2,417		2,417
1999 John Deere Tractor	2,000 ⁵		2,000
1999 Harley Davidson Motorcycle	1,000		1,000
Fire Dept. Pension Fund	120,397		120,397
Furnishings in Husband's Residence	600 ⁵		600
Cash	<u>650⁵</u>	<u> </u>	<u>650</u>
<u>Totals</u>	<u>\$200,814</u>	<u>\$ 83,250</u>	<u>\$117,564</u>

The trial court found that Wife's only source of income was her monthly Social Security disability check of \$629 per month. It further found that Wife cannot be rehabilitated due to her medical condition. The court also found that Husband's salary with the Tennessee Department of Transportation, coupled with his retirement income from the Fire Department, was \$5,126.18 per month. Based on these findings, the court ordered Husband to continue paying Wife's mortgage payment, as well as \$1,200 per month alimony *in futuro*. In addition, the court ordered Husband to pay all of Wife's medical expenses through October 24, 2000, and thereafter two-thirds of all medical expenses not covered by medical insurance. Husband also was ordered to pay Wife's health insurance premiums. Wife was ordered to obtain a reasonable health care plan.

³The bed and board divorce had been granted in 1992 by Judge William M. Barker. When Judge Barker was appointed to the appellate bench, he was replaced by Judge L. Marie Williams who presided at all subsequent proceedings.

⁴ Value shown is based on Wife's testimony. No value was assigned by the trial court or Husband.

⁵ Value shown is based on Husband's testimony. Wife's estimate was higher in each case. We have adopted Husband's estimate in order to test whether the trial court's division is equitable assuming the lower values.

Upon Husband's motion to alter or amend, the trial court modified its previous order requiring Husband to pay two-thirds of Wife's medical expenses. It decreed, instead, that Husband would be required to pay only one-third of these expenses.⁶ The trial court further clarified its ruling on this matter by stating that Husband's responsibility for medical expenses would not include any nonprescription medications and would only encompass those medical expenses "deemed medically necessary by [Wife's] treating physicians." With respect to Husband's responsibility for Wife's mortgage payment, the trial court modified its ruling to provide that Husband would be responsible only for the principal and interest portion of the mortgage and that Wife would be responsible for all taxes, insurance, and maintenance on the residence.

Thereafter, both parties filed a notice of appeal. Husband subsequently dismissed his appeal. Wife argues before us that the trial court erred (1) in granting the parties an absolute divorce rather than retaining the bed and board decree previously granted to Wife; (2) in the way it divided the marital estate; (3) in failing to require Husband to obtain life insurance as security for Wife; (4) in requiring Husband to pay only one-third of Wife's medical expenses; and (5) in requiring Wife to pay all taxes and insurance on her residence.

II. *Standard of Review*

Our review of this non-jury case is *de novo* upon the record with a presumption of correctness as to the trial court's factual findings, "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). The trial court's conclusions of law are not accorded the same deference. *Brumit v. Brumit*, 948 S.W.2d 739, 740 (Tenn. Ct. App. 1997).

III. *Absolute Divorce*

In Tennessee, a trial court is authorized to grant an absolute divorce pursuant to T.C.A. § 36-4-129. As previously quoted in footnote 1 to this opinion, subsection (b) of that statute provides as follows:

The court may, upon stipulation to or proof of any ground for divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce, declare the parties to be divorced, rather than awarding a divorce to either party alone.

One of the grounds for divorce under T.C.A. § 36-4-101 (2001), is found at subsection (15) of that code provision:

⁶In making this modification, the trial court stated that it "[f]ound] it necessary [that] Mr. Van Horn be given an incentive to provide a reasonable plan of health insurance for Mrs. Van Horn."

For a continuous period of two (2) or more years which commenced prior to or after April 18, 1985, both parties have lived in separate residences, have not cohabited as man and wife during such period, and there are no minor children of the parties.

If a party proves to the satisfaction of the trial court that the requirements of T.C.A. § 36-4-101(15) have been met, the court has the power under T.C.A. § 36-4-129(b) to either declare the parties divorced or award the divorce to the party who is less at fault. This is the clear meaning of the language of these two statutes when read together.

At the bench trial below, the court concluded that Husband had established a ground for divorce pursuant to T.C.A. § 36-4-101(15). Based upon this finding, the court declared the parties divorced under the authority of T.C.A. § 36-4-129(b). The court further found that the divorce could have been awarded to Wife pursuant to T.C.A. § 36-4-102(b) (2001),⁷ but that the court's decision under T.C.A. § 36-4-129(b) rendered such a decision moot.

Wife argues that the trial court erred in declaring the parties divorced. She contends that only she was entitled to an absolute divorce, and she was not seeking such relief. We disagree with her contention. T.C.A. § 36-4-129(b) clearly states that if a ground for divorce is proven pursuant to T.C.A. § 36-4-101 (2001), the divorce can be granted to the party who is less at fault “*or, if either or both parties are entitled to a divorce,*” the court can declare the parties divorced. Under this statute, the trial court clearly had the authority to declare the parties divorced, as Husband had demonstrated that there was a T.C.A. § 36-4-101(15) ground for divorce. We find no error in the trial court's decision to declare the parties divorced.

Wife further argues that the trial court was in error as it apparently “took the position that after two (2) years since the entry of the aforesaid decree [of a bed and board divorce] that it was required to grant an absolute divorce to the parties.” However, there is nothing in the record to indicate that the trial court acted out of any sense of compulsion or even that it acted pursuant to T.C.A. § 36-4-102(b); rather, it is clear to us that the court acted pursuant to T.C.A. §§ 36-4-101(15) and 36-4-129. The latter two statutes, without regard to T.C.A. § 36-4-102(b), gave the trial court

⁷T.C.A. § 36-4-102(b) provides as follows:

If the other party specifically objects to legal separation, the court may, after a hearing, grant an order of legal separation, notwithstanding such objections if grounds are established pursuant to § 36-4-101. The court also has the power to grant an absolute divorce to either party where there has been an order of legal separation for more than two (2) years upon a petition being filed by either party which sets forth the original order for legal separation and that the parties have not become reconciled. The court granting the divorce shall make a final and complete adjudication of the support and property rights of the parties. However, nothing in this subsection shall preclude the court from granting an absolute divorce before the two-year period has expired.

all of the authority it needed to declare the parties divorced. As we read T.C.A. § 36-4-101(15), it is a separate ground for an absolute divorce that can operate independently of the bed and board/absolute divorce scheme of T.C.A. § 36-4-102(b).

Finally, in vehemently opposing the granting of an absolute divorce to the parties, Wife repeatedly emphasizes her need for health insurance due to her serious medical condition. She argues that the continuation of the bed and board divorce arrangement was necessary for her to remain on Husband's health insurance, as she would be unable to obtain health insurance on her own. However, in its order, the trial court provided for Wife's health insurance concerns by ordering Husband to pay, as a form of alimony, the premiums on the new health insurance policy that Wife would be obtaining. In addition, the court ordered Husband to pay for all of Wife's outstanding medical expenses through October 24, 2000, as well as one-third of all of Wife's uncovered reasonable and necessary medical expenses thereafter. In any event, the trial court had the statutory power to declare the parties divorced; consequently, we find no error in the court's decision to exercise that power.

IV. Property Division

Property must be equitably divided and distributed between the parties once it is properly classified as marital. See T.C.A. §36-4-121(a)(1) (2001). "Trial courts have wide latitude in fashioning an equitable division of marital property." **Brown v. Brown**, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994). Such a division is to be effected upon consideration of the statutory factors found in T.C.A. § 36-4-121(c) (2001).

"[A]n equitable property division is not necessarily an equal one. It is not achieved by a mechanical application of the statutory factors, but rather by considering and weighing the most relevant factors in light of the unique facts of the case." **Batson v. Batson**, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). It is not necessary that both parties receive a share of each piece of property. **Thompson v. Thompson**, 797 S.W.2d 599, 604 (Tenn. Ct. App. 1990). Appellate courts are to defer to a trial court's division of marital property unless the trial court's decision is inconsistent with the statutory factors or is unsupported by the preponderance of the evidence. **Brown**, 913 S.W.2d at 168.

In the instant case, Wife argues that she only received \$50,250 in the trial court's division of marital property. However, Wife fails to take into account that Husband is required to pay the balance of the mortgage on the former marital residence, which amounts to \$33,000. Therefore, Wife, who was awarded the marital residence—in effect, free and clear of the mortgage indebtedness—is receiving an additional benefit of \$33,000, making her real award, including a residence worth \$77,000, actually one in the total amount of \$83,250. The value of the net property awarded to Husband is \$117,564, which amounts to 58.5% of the net marital estate. We find that the evidence does not preponderate against this distribution. In its order, the trial court found that this was an equitable division "as the parties have lived apart for an extensive period of time while [Husband's Fire Department] pension has accumulated." This is a factor that the court could, and did rely upon

as one “necessary to consider the equities between the parties.” *See* T.C.A. § 36-4-121(c)(11). We also note that the pension awarded to Husband is a part of his monthly income that will be used to fund Wife’s alimony *in futuro* award. We find no abuse of discretion in the trial court’s division of marital property.

V. Life Insurance

Wife argues that the trial court erred in failing to require Husband to carry life insurance as additional security for Wife. Apparently, Wife did not raise the issue of life insurance until she filed her motion to alter or amend the trial court’s judgment. In denying Wife’s motion, the trial court stated that “[n]o proof was presented at trial concerning the cost of life insurance or need therefor.” In the absence of evidence on these elements, we find no error in the failure of the trial court to order Husband to carry insurance on his life for the benefit of Wife.

VI. Alimony

Wife argues that the trial court erred in requiring Husband to pay only one-third of Wife’s uncovered medical expenses. Further, Wife contends that the trial court erred in requiring her to pay all taxes and insurance on the marital residence. As Husband’s payment of Wife’s medical expenses, as well as the argued-for payment of taxes and insurance on her residence, generally speaking, would be considered alimony, we will discuss them in that context.

In determining the propriety, nature, and amount of an alimony award, courts are to consider the statutory factors enumerated in T.C.A. § 36-5-101(d)(1)(A)-(L) (2001). “[T]here is no absolute formula for determining the amount of alimony.” *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995). The two most important factors in setting the amount of an alimony award are need and the ability to pay, with need being “the single most important factor.” *Id.*, quoting *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989). Because the amount of alimony to be awarded is within the trial court’s sound discretion in view of the particular circumstances of the case, appellate courts will not alter such awards absent an abuse of discretion. *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997).

The trial court ordered Husband to make the monthly mortgage payments of \$442⁸ on the marital residence and to pay Wife \$1,200 per month as general alimony *in futuro*, which amounts to a total monthly benefit flowing from Husband to, or for the benefit of, Wife in the amount of \$1,642. In addition, the court ordered Husband to pay Wife’s health insurance premiums, which, given her state of health, may be significant; all of Wife’s existing medical bills through October 24, 2000; and one-third of Wife’s future medical expenses not covered by insurance. To the extent that it can be quantified at this time, at a minimum, Wife will have the use or benefit of pre-tax money of \$1,642 to supplement her non-taxable Social Security disability payment of \$629.

⁸ This amount represents principal and interest only.

Our review of the record reveals no abuse of discretion in the trial court's ruling. "A trial court acts within its discretion when it applies the correct legal standard and reaches a decision that is not clearly unreasonable." *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001). We find that the trial court applied "the correct legal standard" in this case; furthermore, we cannot say that the trial court's decision was clearly unreasonable. Therefore, we find Wife's issues regarding these matters to be without merit.

VII. *Conclusion*

The judgment of the trial court is affirmed. This case is remanded for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Linda Gail Van Horn.

CHARLES D. SUSANO, JR., JUDGE